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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RICHARD M. DAVIS III,  
  
Plaintiff and Respondent,

v.

CODIE DAVIS,  
  
Defendant and Appellant.

2d Civil No. B301564  
(Super. Ct. No. 18FL00408)  
(Santa Barbara County)

The old adage “timing is everything” is apropos in this case. Codie Davis appeals an order denying her anti-SLAPP motion to strike (Code Civ. Proc., § 425.16)<sup>1</sup> a temporary restraining order and request to extend the temporary restraining order under the Domestic Violence Prevention Act. (DVPA; Fam. Code, § 6300, subd. (a).) We affirm and hold the motion was premature because the temporary restraining order and request to extend

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise stated.

the temporary restraining order was an interim DVPA matter and not yet a “cause of action” within the meaning of section 425.16. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 652 (*Thomas*).)

### *Procedural History*

On December 20, 2018 Codie sued her ex-husband, Richard, for domestic violence, battery, assault, negligence, and infliction of emotional distress based on alleged acts of marital abuse dating back seven years. (*Davis v. Davis* (Super. Ct. Santa Barbara County, 2018, No. 18CV06318.) The complaint was filed three months after Codie obtained a judgment of marital dissolution.

Codie forwarded a copy of the civil complaint to the Vandenberg Air Force Base (VAFB) Provost Marshall where Richard worked and requested a criminal investigation under the Uniform Code of Military Justice.

On June 13, 2019, Richard served a domestic violence temporary restraining order (TRO) and Request for Domestic Violence Restraining Order (DVRO; Fam. Code, § 6200 et seq.) to extend the TRO.<sup>2</sup> (*Davis v. Davis* (Super. Ct. Santa Barbara County, 2019, No. 18FL00408.) The moving papers stated that Codie had harassed Richard at work after finding documents (“nuclear weapons information”) in the family home consisting of 10-year-old Air Force training manuals, Air Force recall rosters,

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<sup>2</sup> The TRO ordered Codie, among other things: not to contact Richard’s employer, any person in his chain of command, or any person in his squadron; and not file any complaints, grievances, or other reports with Richard’s employer without leave of court.

and emails between Codie and Richard. Richard stated that Codie attempted to gain access to VAFB, contact Richard, and “continues to harass me and threaten [my military] career.” Codie had filed complaints against Richard and his First Sergeant and his base Commanders, and lodged accusations with the Air Force Security Forces, Air Force Medical, the Air Force Office of Special Investigations, the Inspector General, the VAFB psychologist, and the Judge Advocate General.

Codie filed a special motion to strike. (§ 425.16.) The trial court denied the motion on the ground that the anti-SLAPP statute did not apply to the TRO or request to extend the TRO because the DVPA action had not yet ripened into a cause of action within the meaning of the anti-SLAPP statute.

Analogizing the case to *Thomas, supra*, 126 Cal.App.4th 635, the court found that a DVRO is like a civil harassment order and “an anti-SLAPP motion is appropriate to challenge a preliminary/permanent injunction, but ***not*** a TRO.”

#### *Discussion*

We review de novo the trial court’s ruling and the legal question of whether section 425.16 applies to a request to extend a domestic violence TRO. (*Thomas, supra*, 126 Cal.App.4th at p. 645.) The Domestic Violence Prevention Act (DVPA; Fam. Code, § 6200 et seq.) vests the trial court with the discretion to issue ex parte and/or on noticed motion, temporary “protective orders,” notwithstanding the absence of a marriage or domestic partnership. (See *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 335 (*Nakamura*)). The DVPA proceeding is initiated by filing a DV-100 Request for Domestic Violence Restraining Order, along with a DV-109 Notice of Court Hearing (Domestic Violence) and a DV-110 Temporary Restraining Order (CLETS-TRO). (Cal.

Practice Guide, Family Law (The Rutter Group 2020) ¶ 5.35, p. 5-17.)

Codie concedes that the anti-SLAPP motion does not apply to the TRO that issued ex parte before she filed the anti-SLAPP motion. Codie, however, claims that the anti-SLAPP statute may be used to strike Richard's DVRO request to extend the TRO, and if it is stricken, the TRO expires on its own terms. We reject the argument because the TRO and DVRO request to extend the TRO "is simply an 'application.'" (*Thomas, supra*, 126 Cal.App.4th at p. 652.) At this point in time, it does not qualify as a "cause of action" under the anti-SLAPP statute as it is not a 'claim' (§ 425.16, subd. (b)(3)), 'complaint' (§ 425.16, subd. (f)), 'action' (§ 425.156, subd. (c)), 'cross-complaint' or 'petition' (§ 415.16, subd. (h))." (*Ibid.*)

In *Thomas*, the petitioner sought an injunction under the civil harassment statute (§ 527.6) to enjoin Quintero from harassing Thomas and members of Thomas's church congregation. (*Thomas, supra*, 126 Cal.App.4th at p. 643.) The trial court issued an ex parte TRO and set the matter for an order to show cause hearing. Quintero was granted a continuance on the order to show cause hearing and filed an anti-SLAPP motion to dismiss the DVPA action, which was denied by the trial court. (*Ibid.*) The Court of Appeal affirmed, holding that the "the anti-SLAPP statute does not apply to a proceeding under section 527.6, subdivision (c), *which is limited to determining whether an interim temporary restraining order* (TRO) should be issued as a prelude to a hearing on the petition for injunctive relief." (*Id.* at p. 642, italics added.)

*Thomas* has been applied to workplace restraining orders brought under section 527.8 which is similar to the civil

harassment statute (§ 527.7). (See *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 617, disapproved on other grounds in *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 410.) We believe the reasoning in *Thomas* applies to a DVRO request to extend a TRO which, under the DVPA, can issue with or without notice to prevent the recurrence of domestic violence. (*Nakamura, supra*, 156 Cal.App.4th at p. 334.) The term “domestic violence” under the DVPA includes harassing behavior, and is broader than the conduct proscribed by the civil harassment code sections discussed in *Thomas* (§ 527.7; civil harassment statute) and *Nakamura* (§ 527.8; workplace harassment statute). The DVPA provides that harassing behavior and domestic violence includes “disturbing the peace of the other party . . . .” (Fam. Code, § 6320, subd. (a).) Unlike the civil harassment and workplace harassment statutes, a DVRO does not require clear and convincing evidence. (Compare *Nakamura, supra*, at p. 334 [civil harassment restraining order requires proof by clear and convincing evidence; § 527.6, subd. (d)], with *In re Marriage of Davila & Mejia* (2018) 29 Cal.App.5th 220, 226 [DVPA requires showing of past abuse by a preponderance of the evidence].) “[A] lower level of proof is required for issuance of a protective order under the DVPA . . . .” (*Cooper v. Bettinger* (2015) 242 Cal.App.4th 77, 90, fn. 14.)

Codie complains that the trial court did not rule on whether Richard is likely to prevail on his DVRO request (see § 425.16, subd. (b)(1)), but that is a moot issue. First, section 425.16 does not apply to a DVRO request to extend a TRO. Second, the trial court already found that Richard made an adequate showing for a TRO. Codie cannot use section 425.16 to turn back the clock and require the trial court make a perfunctory ruling on the

likelihood of Richard prevailing on his DVRO request for a preliminary injunction. In the words of the court, “*Nakamura*[, *supra*, 156 Cal.App.4th 327] does not support [the] grant of an anti-SLAPP motion at this time and at this stage [of the proceedings] . . . [A]n anti-SLAPP motion is appropriate to challenge a preliminary/permanent injunction, but not a TRO.” That is consistent with *Thomas* which holds that the anti-SLAPP statute does not apply to a proceeding to determine “*whether [a TRO] should be issued as a prelude to a hearing on the petition for injunctive relief.*” (*Thomas, supra*, 126 Cal.App.4th at p. 642, italics added.)<sup>3</sup> Nor does section 425.16 apply to a request to extend the TRO because it is not yet a “cause of action” within the meaning of the anti-SLAPP statute. (*Id.* at p. 652.)

Citing *Nakamura, supra*, 156 Cal.App.4th 327, Codie argues that a request to extend a domestic violence temporary restraining order is a “cause of action” and can be challenged by an anti-SLAPP motion to dismiss. In *Nakamura*, the ex-wife appealed the trial court’s summary denial of her request for a TRO under the DVPA. That was the sole basis for the appeal; no anti-SLAPP motion was filed to dismiss the action. The Court of Appeal concluded that “the facial adequacy of Nakamura’s factual allegations to show that she was ‘abused’ within the meaning of

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<sup>3</sup> Codie’s anti-SLAPP motion was premature and could not be filed until the trial court set an order to show cause hearing to determine whether a preliminary injunction should issue. At that point in time, it becomes a “cause of action” for purposes of section 426.16. (*Thomas, supra*, 126 Cal.App.4th at p. 647; see *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1494-1495 [describing the TRO and order to show cause procedure under the DVPA].)

the DVPA operated to divest the court of discretion to summarily deny her application [for a TRO].” (*Id.* at p. 337.) The court, in dicta, stated: “Unlike requests for restraining orders in many other contexts, which simply seek to maintain the status quo pending ultimate resolution of one or more causes of action, an application for an order under the DVPA to restrain a person for the purpose of preventing the recurrence of domestic violence is, like a civil harassment petition under Code of Civil Procedure section 527.6, itself essentially a “cause of action” (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 647 . . .), and may properly be considered an independent ‘lawsuit’ [citation].” (*Nakamura, supra*, 156 Cal.App.4th at p. 335.) The court was referring to a DVPA order to show cause hearing where the trial court has the discretion to issue an injunction that has “a duration of not more than five years” and “may be renewed, upon the request of a party, either for five years or permanently, without a showing of any further abuse . . . .” (Fam. Code, § 6345, subd. (a).) *Nakamura* is consistent with *Thomas* and does not assist Codie.

Equally without merit is the argument that Codie has a constitutional right to file complaints about Richard with the Air Force Security Force, Air Force Office of Special Investigations, the Air Force Inspector General, and the Staff Judge Advocate General. Domestic violence is not a protected activity or involve an issue of public interest as defined by the anti-SLAPP. (See *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 152 [motion to strike must demonstrate that plaintiff’s action is connected with a public issue]; *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, 1428 [order prohibiting dissemination of information was not a prior restraint because it was “abuse” under the DVPA and could not be protected speech].)

*Sanctions*

Richard argues that the appeal is frivolous and warrants sanctions. Because this is a matter of first impression, we cannot say the appeal is frivolous. Codie has been provided a fair trial and appeal, and it has been contentious and costly for both sides. “Somewhere along the line, litigation must cease.” (*In re Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1613.)

*Disposition*

The judgment (order denying special motion to strike) is affirmed. Richard is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.



James F. Rigali, Judge

Superior Court County of Santa Barbara

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Frederickson & Hamilton and Roger B. Frederickson for  
Defendant and Appellant.

Epps & Gilroy, Darren W. Epps and Anne E. Busch, for  
Plaintiff and Respondent.